Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID L. CHAPMAN, et al,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA, et al,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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AMICI CURIAE

1. American Judicature Society
2. Arizona Bar Foundation
3. State Bar of Arizona
4. Arkansas Bar Association
5. Colorado Bar Association
6. Colorado Lawyer Trust Account Foundation
7. Delaware State Bar Association
8. District of Columbia Bar Foundation
9. The Florida Bar
10. Florida Bar Foundation
11. Hawaii State Bar Association
12. Hawaii Bar Foundation
13. Idaho State Bar
14. Idaho Law Foundation
15. Lawyers Trust Fund of Illinois
16. Lawyer Trust Account Commission of the Supreme Court of Iowa
17. Kansas Bar Foundation
18. Maryland Legal Services Corporation
19. Massachusetts Bar Foundation

20. Boston Bar Foundation

21. Minnesota State Bar Association

22. Minnesota Lawyer Trust Account Board

23. Mississippi State Bar

24. Mississippi Bar Foundation

25. Missouri Lawyer Trust Account Foundation

26. National Bar Association

27. National IOLTA Clearinghouse

28. National Legal Aid & Defender Association

29. Nebraska Lawyers Trust Account Foundation

30. State Bar of Nevada

31. New Hampshire Bar Foundation

32. State Bar of New Mexico

33. New Mexico Bar Foundation

34. New York State Bar Association

35. Interest on Lawyer Account Fund of the State of New York

36. North Carolina State Bar

37. North Carolina State Bar Plan For Interest on Lawyers' Trust Accounts

38. Office of the Ohio Public Defender

39. Oklahoma Bar Association

40. Oklahoma Interest on Lawyers' Trust Account Program

41. Oregon State Bar

42. Oregon Law Foundation

43. Rhode Island Bar Association

44. Rhode Island Bar Foundation

45. State Bar of South Dakota

46. Tennessee Bar Association

47. Tennessee Bar Foundation

48. State Bar of Texas

49. Texas Equal Access to Justice Foundation

50. Utah State Bar

51. Utah Bar Foundation

52. Vermont Bar Association

53. Washington State Bar Association

54. Legal Foundation of Washington

55. The West Virginia State Bar

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INTEREST OF AMICI CURIAE

The California interest on lawyers' trust accounts program, like the 36 similar programs throughout the country (herein collectively referred to as "Interest on Lawyers' Trust Account Programs," or "IOLTA" programs) operates on

the premise that nominal sums of money, or short term deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. In short, IOLTA establishes a unique method of financing civil legal aid by harnessing assets that before adoption of the program, were neither used nor capable of use.[1]

The fifty-five Amici Curiae are all organizations vitally interested in the continued growth and success of IOLTA programs as a mechanism for bringing the

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1. IOLTA's history and method of operation is explained in England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101 (1982). For a detailed explanation, and in depth analysis of the constitutional issues implicated by IOLTA, see Siegel, Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client? 36 U. Fla. L. Rev. 674 (1984).

concept of equal justice under the law a step closer to reality. The twenty-three participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The twenty-eight participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes.

The American Judicature Society, the National Bar Association and the National Legal Aid & Defender Association appear as amici because they represent a membership committed to improving the justice system so that all may have an equal opportunity to vindicate their rights. The National IOLTA (Interest on Lawyers' Trust Accounts) Clearinghouse provides technical assistance to states seeking to

adopt and implement IOLTA programs.

Each participating Amicus Curiae believes that IOLTA is critically important to ensuring that those in need of legal services do not go without. Their participation, and the participation of the Ford Foundation in providing funds to assist in the preparation of this Amici Curiae brief, all attest to the acceptance of the IOLTA concept by providers of legal services to the poor and a broadly representative sample of the legal profession throughout the country. Firmly believing that IOLTA programs are in the best tradition of the legal profession and not violative of the fifth amendment, Amici Curiae fully support the State Bar of California's and the Intervenors' position that the California IOLTA program does not violate the Taking Clause of the fifth amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

ARGUMENT

IOLTA PROGRAMS, WHICH DO NOT INJURE CLIENTS EVEN TO THE EXTENT OF A PENNY, ARE FULLY CONSISTENT WITH CURRENT SUPREME COURT TAKINGS JURISPRUDENCE.

A. IOLTA's Nationwide Acceptance.

Thirty-six states and the District of Columbia have adopted IOLTA programs. The highest courts of seven states have published formal opinions adopting IOLTA programs; expressly holding that IOLTA does not violate the fifth amendment. Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981); Petition of Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982); Petition of New Hampshire Bar Association, 122 N.H. 971, 453 A.2d 1258 (1982); Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983); In the Matter of the Adoption of

Amendments to CPR DR 9-102 IOLTA, 102 Wash.2d 1101 (1984); In the Matter of Interest on Lawyers' Trust Accounts, 283 Ark. 252, 675 S.W.2d 355 (1984), rev'g, 279 Ark. 84, 648 S.W.2d 480 (1983); Petition by Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985).

In addition, twenty-five state supreme courts have adopted IOLTA programs without formal opinion. Besides California, IOLTA programs have been established by legislation in Connecticut, Maryland, New York and Ohio. IOLTA UPDATE, National IOLTA Clearinghouse, Vol. 3, No. 1 (Summer 1985). The American Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

No court, in an adversary proceeding, has ever rejected an IOLTA pro-

gram.[2] Four state supreme courts, without opinion, have refused to approve IOLTA programs. Petitions seeking the adoption of IOLTA programs are currently pending before six state supreme courts. IOLTA UPDATE, National IOLTA Clearinghouse, Vol. 3, No. 1 (Summer 1985).

Two basic reasons account for the overwhelming acceptance of IOLTA. First, the legal profession fully recognizes the critical need for additional resources to

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2. Besides the instant matter, the only pending adversary litigation is Glaeser v. The Florida Bar, No. 84-1345 (M.D. Fla. filed Oct. 11, 1984). Two other challenges to IOLTA programs have been rejected. In Ronwin v. Supreme Court of Iowa, (No. 84-1641), pet. for cert. denied, ____ U.S. ____ (May 14, 1985), this Court rejected an attempt to seek certiorari from the IOWA Supreme Court's rule-making adoption of an IOLTA program. Terry v. Withrow, No. C85-1767 (N.D. Ohio filed June 21, 1985), filed by an attorney, was dismissed for lack of standing.

improve the justice system. Second, there is no merit to the IOLTA opponents' taking claim.

This Court's multifactor balancing test [Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)], which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with distinct investment-backed expectations, leads to the inevitable conclusion that IOLTA programs do not take the client's property. Indeed, where the claimant's property is not otherwise impacted, loss of future profits will not support a taking claim. Andrus v. Allard, 444 U.S. 51 (1979). Or as Justice Peckham put it, if a claimant is "not injured to the extent of a penny . . . his abstract rights are

unimportant." Hooker v. Burr, 194 U.S. 415, 419 (1904).

Because established taking doctrine requires at least some loss, and because petitioners can point to no loss from the operation of California's IOLTA program, their claim is not well-founded and does not merit review by this Court.

B. The IOLTA Premise. In upholding California's IOLTA program, the California Court of Appeal, like the 32 state supreme courts which have approved similar programs, recognized that IOLTA combines lawyer trust account mandates, economic realities, and banking law restrictions, to produce net income where, previously, there was no net income.

IOLTA is simplicity itself. Attorneys routinely receive funds in trust for future transactions. If the funds are large in amount or expected to be held

for a long time, the attorney customarily deposits the funds in an interest-bearing account for the benefit of the client. IOLTA does not change this time-honored practice.

Often, however, lawyers hold clients' money in amounts which are very small or expected to be held for a very short period of time, making it impracticable and uneconomical to invest the money productively for the client.[3] As a result, no interest is earned on these pooled accounts. Only the lawyer's fi-

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3. The wide range of costs that lawyers incur include (1) the time to determine whether investment is warranted, (2) the time to obtain tax identification information, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation on tax reporting forms, and (6) the time required to close a separate, income producing account. A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, Report to the Board of Governors, 22-24 (July 1982).

nancial institution benefits. Under IOLTA, all the inherently unproductive client deposits are pooled in an interest-bearing NOW account. The clients lose nothing. The interest earned only because of IOLTA is used to support law-related public services.

A few brief examples of the essentially nonproductive funds one would expect to find in an attorney's trust account wi'l demonstrate why no client is injured, even to the extent of a penny.

1. **Cost Deposits**. A client involved in litigation is often required to provide costs in advance. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The fact pattern in Glaeser v. The Florida

Bar, No. 84-1345 (M.D. Fla. filed Oct. 11, 1984) is typical. There the client gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Indeed, as a practical matter, $13.75 is inherently incapable of being put to productive use for an individual. The approximately 6¢ per month in earnings, at NOW account rates, would not offset bank service charges, let alone the costs incurred by attorneys to administer a separate interest-bearing account.

2. **Real Estate Escrows.** An attorney, representing the seller of a small piece of property, receives $500 to be

held in escrow. At closing, some thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The interest on the deposit, $2.19 per month, would not justify the expense required to negotiate provisions relating to the payment of interest or to set up a separate NOW account.

3. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has "accepted" the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. In addition, there are a number of circumstances under which mon-

ies from the check or draft may stay in the account for days after disbursements are made. For example, assume $50,000 is received by an attorney on a Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. Everything has proceeded expeditiously, more expeditiously than likely. Does the client have any expectation of receiving interest on the settlement amount during the four day "float" period? Clearly not. Yet, if the attorney's trust account were an IOLTA NOW account, some $28.76 would have been earned.

4. **Real Estate Closings**. In many instances, real estate closings are done in law offices. The attorney may receive the funds by wire a day in advance, thereby producing a one day accrual of

interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. As with personal injury settlements, disbursement checks will not clear instantly. The short term float will produce interest that cannot be apportioned in any rational way. Before IOLTA, only banks benefited from the float. Now, the public shares in the benefit.

C. Lack of a Substantial Constitutional Question. If customary trust rules are applied to attorney trust accounts, a client has no claim to interest earned in situations where the interest earned does not exceed the administrative costs incurred. IOLTA operates on that very real state of facts. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) does not preclude the IOLTA's proponent's calculus that recog-

nizes the real cost of producing net income. If IOLTA is a taking, only banks, not clients, will benefit.

No substantial constitutional questions have emerged in any state with an IOLTA program. The rationale utilized by the Court below, as well as the reasons offered in support of IOLTA programs by the seven states with reported opinions, are fully consistent with this Court's taking jurisprudence.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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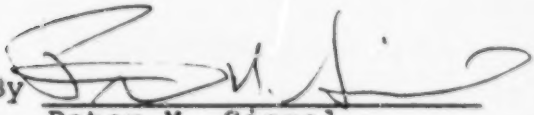
By 
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that, in accordance with Rule 28.3, I have served three copies of the annexed Brief in Opposition to the Granting of a Writ of Certiorari on the attorneys of record by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

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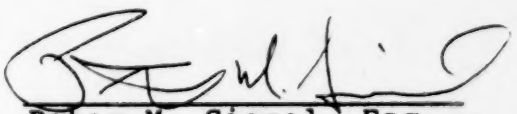
All parties required to be served have been served. Done this 29th day of August, 1985.



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